In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-646

SOUTHERN CALIFORNIA EDISON COMPANY,
Appellant,
vs.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
ROBERT BATINOVICH, WILLIAM SYMONS, JR.,
VERNON L. STURGEON, LEONARD ROSS,
and RICHARD D. GRAVELLE,
the Members of and constituting said
Public Utilities Commission,
Appellees.

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Appellant,
vs.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
ROBERT BATINOVICH, WILLIAM SYMONS, JR.,
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and RICHARD D. GRAVELLE,
the Members of and constituting said
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Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

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The Appellees (the Commission) move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of California,

on the grounds that the appeal does not present a substantial federal question and is not ripe for review.

I
OPINIONS BELOW

The opinions below are correctly stated in Appellant's (Edison's) Jurisdictional Statement.[1]

II
JURISDICTION

Jurisdiction is asserted by Edison under Title 28, United States Code § 1257(2). (Jur. St. 3).

III
QUESTION PRESENTED

Does the Commission's action in adopting 8.80% as a fair and reasonable rate of return for Edison, constitute an abuse of discretion because it sets confiscatory rates, thus depriving Edison of its property without due process of law in violation of the 14th Amendment of the United States Constitution?

IV
ARGUMENT

A. Edison Has Misstated the Question Presented By This Case.

Edison asserts that two federal questions are presented, to wit: (1) whether certain United States Supreme Court decisions, referred to by the Commission, preclude a

[1]References herein to appendices are to those attached to the Jurisdictional Statement. "Jur. St." followed by a number refers to pages of the text of the Jurisdictional Statement.

state regulatory agency from adopting an allowed rate of return at a level higher than the minimum to avoid confiscation; and (2) whether a state regulatory agency, having set rates designed to produce the minimum revenue (return) required by law, and in so doing having allegedly arbitrarily and unjustly disregarded certain costs, and unreasonably assumed the existence of a federal tax credit, has violated Edison's rights under the Fourteenth Amendment to the United States Constitution by depriving it of its property without due process.

By stating the questions in the above manner, Edison seeks to have this Court substitute its judgment for that of the Commission regarding calculation of a just and reasonable rate of return for Edison. This is clearly a role which this Court has declined to play. In suits involving the validity of rates fixed by a state commission, this Court will not sit as a board of revision, but will concern itself only with the question of whether constitutional rights have been violated. *Railroad Commission v. Pacific Gas & Electric Co.*, 1938, 302 U.S. 388, 393; *Los Angeles Gas & Electric Co. v. Railroad Commission*, 1933, 289 U.S. 287, 304, 305. The only question present in this case is whether in the exercise of its rate-making authority, this Commission abused its discretion in such a way as to set confiscatory rates for Edison, thus depriving it of property without due process. If the Commission did not abuse its discretion in setting rates, no federal question remains to be answered.

B. Edison Has Not Sustained Its Burden of Proving that the Commission Adopted a Confiscatory Rate of Return.

It is well settled that a decision of a state commission setting rates and adopting a rate of return for a public utility, which decision has been upheld by the highest court of the state, is presumed to be valid. A utility protesting such a decision has a heavy burden of making a convincing showing that the decision is invalid because it is unreasonable and unjust. *Federal Power Commission v. Hope Natural Gas Company,* 1944, 320 U.S. 591, 602; *Railroad Commission v. Pacific Gas & Electric Company, supra,* at 401. Edison has completely failed to make this showing.

1. Edison Erroneously Alleges that the Commission Has Misconstrued the Standards Set Forth by the United States Supreme Court for Determining an Adequate Rate.

Edison contends that the Commission misinterpreted this Court's guidelines in *Federal Power Commission v. Hope Natural Gas Company, supra,* at 605, and *Bluefield Waterworks and Improvement Co. v. West Virginia Public Service Commission,* 1923, 262 U.S. 679, 692-693, in adopting a fair and reasonable rate of return. (Jur. St. 3, 13). Edison asserts that the Commission, in adopting a rate of return which satisfied the minimum which is required by law, did so because it believed it was precluded by the *Hope* and *Bluefield* decisions, *supra,* from setting a higher rate.

This interpretation cannot be read into the Commission's decision. Decision No. 86794 merely recites the requirements of these decisions and indicates that they are the

minimum required by law. (Appx. 1, p. 5). The Commission nowhere asserts that it believes the *Hope* and *Bluefield* decisions, *supra,* have precluded it from considering anything but the minimum rate of return. Edison recognizes that this minimum level is constitutionally permissible. (Jur. St., 13-14).

In the *Bluefield* case, *supra,* at page 692, this Court stated that as a measure of fairness and reasonableness a utility is entitled to earn a return "... equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties...;" furthermore, *Hope, supra,* makes clear that ". . . under the standard of 'just and reasonable' it is the result reached not the method employed which is controlling." (*Id.,* page 603). While the rate of return must fall within a zone of reasonableness, it is within the Commission's discretion to choose a rate of return within this zone which in its judgment best protects both the ratepayers and the utility. It is not unreasonable for the Commission to have adopted the lowest rate of return which would satisfy the *Hope* and *Bluefield* standards. The fact that this rate is lower than what Edison would have wished does not raise a constitutional issue.

2. The Commission Properly Considered Edison's ITC Benefits as a Factor in Adopting a Fair and Reasonable Rate of Return.

Edison argues that the Commission based its decision in part on the decrease in financial risk resulting from Edison's election of ratable flow-through treatment of its

investment tax credit (ITC). According to this argument, the Commission erroneously assumed that Edison would continue to be eligible for ITC under the IRS regulations. Because of this error, Edison contends, a rate of return was adopted which cannot produce even the minimum constitutionally permitted revenue (Jur. St. 22).

Edison's assertion that the Commission's action will cause it to lose its ITC eligibility is based on its misunderstanding of the role that ITC played in the Commission's decision to adopt a rate of return of 8.80%. The Commission did not set a rate of return and subsequently adjust it downward by some certain but unstated amount representing ITC. Rather, the Commission considered a host of relevant factors, as it always does when, in a general rate case, it adopts a rate of return for a new test year. (Decision No. 87828, Appx. 2, pp. 125, 133-135). In addition, in adopting the rate of return, the Commission considered all of the available evidence relative to Edison's ITC eligibility and to the proper treatment of its ITC benefits. (See Decision No. 87828, Appx. 2, pp. 114-143).

Edison further contends that if it receives a letter from the IRS to the effect that the Commission's action will render it ineligible for the ITC benefits, Edison will be irreparably harmed because the prohibition against retroactive ratemaking would prevent the Commission from making Edison whole.

Edison's speculative claim of irreparable damage, based on the contingency of some future administrative action, is clearly premature and is not ripe for review by this Court. *Federal Power Commission v. Hope Natural Gas Company, supra*, at 619. Edison has not received a

letter ruling from the IRS, and may not rely on rulings applying only to other taxpayers. (Tax Reform Act of 1976, 26 U.S.C. § 6110(j)(3)). Even if it had received its own letter ruling, this would merely constitute tax planning advice. It could not be construed as a binding statement of the law, nor would it necessarily result in the assessment of any tax liability. The Commission exhaustively reviewed all the evidence put forth by all parties on the matter of ITC. Its conclusion on the facts of this case was based on a knowledgeable and thorough review of prior IRS letter rulings, relevant statutes and regulations, and guidance from the California Supreme Court.

Edison cites *New England Telephone & Telegraph Co. v. Public Utilities Commission*, Slip Op., pp. 12-36 (Maine S. Ct., June 28, 1978) Division No. 752, CCH Utilities Law Reports—State, 7-31-78, par. 22596.03, as support for its contention that a state commission may not fix rates in a manner jeopardizing a utility's eligibility for certain tax benefits. The state commission there calculated rates on the basis of accelerated depreciation with flow-through while at the same time ordering the utility to keep its books using accelerated depreciation without flow-through. The state court found this to be arbitrary, as well as directly contrary to Congressional economic policy. The court also found that such treatment created "a reasonable likelihood" that the utility would lose its ability to take accelerated depreciation, although the basis for this finding was not discussed. In Edison's case, unlike that in *New England, supra*, no different treatment of ITC for accounting and ratemaking purposes exists. Moreover, the Commission specifically reviewed Congressional committee re-

ports and proposed federal regulations in order to ensure that its decision would not conflict with federal policy. Thus it cannot be maintained that the Commission has acted in an arbitrary manner. The *New England* decision, *supra*, is clearly distinguishable on its facts.

3. The Commission Did Not Abridge Edison's Due Process Rights in Deciding Rate Base and Rate of Return Questions.

Edison alleges that three other aspects of the Commission's decision make the rates set therein confiscatory. First, Edison argues that the Commission made no adjustment for the fact that the new rates would not be effective until after the end of the test year. Therefore, Edison argues, because of earnings attrition due to inflation, Edison cannot possibly earn the minimum rate of return which the Commission deemed to be required by law. (Jur. St. 24). Edison also contends that the Commission denied it due process by failing to include in rate base certain plant additions which are characterized as not increasing Edison's system capacity. (Jur. St. 24). Lastly, Edison argues that the Commission violated the standards of the *Hope* and *Bluefield* cases, *supra*, by fixing rates which will prevent Edison from issuing new shares of common stock at a price approximating book value. (Jur. St. 25).

Edison misstates the facts with regard to its first two contentions. The record shows that the rate of return adopted for Edison (8.80%) was near the high end of a range between 8.60 percent and 8.90 percent recommended by a Commission staff expert witness as being fair, reasonable, and including consideration of inflationary pressures.

Concerning plant additions and rate base, the Commission followed its historic method of including these additions in rate base on a weighted average basis, reflecting those portions that did go into operation prior to the end of the test year. Moreover, Edison fails to substantiate its claims of confiscation in its first and second arguments.

As to its third contention, based on an alleged violation of the standards set by the *Hope* and *Bluefield* decisions, *supra*, Edison presents no specific references to these cases. Neither case contains any support for Edison's claim; in fact, language in the *Hope* decision, cited earlier, clearly contemplates a balancing of consumer and investor interests.

New England Telephone & Telegraph Co. v. Department of Public Utilities, Mass. 1976, 354 N.E.2d 860, cited by Edison as being "substantially on all fours" with the instant case, made no attempt to follow *Hope* and *Bluefield*. Indeed, the Massachusetts court gave no authority other than its own decisions to support its holding that a rate which will allow future stock sales to occur only below book value constitutes "...forced dilution which is confiscation, at least in absence of some explanation not present in this case." (*Id.* at p. 867). This case is clearly inconsistent with *Hope, supra*, wherein this Court also stated that:

> "Thus we stated in the *Natural Gas Pipeline Company* case that regulation does not insure that the business shall produce net revenues." (*Hope, supra*, at p. 603).

The Commission's decisions set out in exhaustive detail the factual and legal bases for its conclusions on rate base and rate of return. In addition to being consistent with

Hope and *Bluefield*, the Commission's decisions fully comport with the requirements placed on it by the California Supreme Court. (See *City of Los Angeles v. Public Utilities Commission*, 1972, 7 C. 3d 331.) Edison's attempts to show that its due process rights were violated amount to no more than dissatisfaction with a balancing process which weighs consumer, as well as investor, interests. Such dissatisfaction presents no federal question.

V

CONCLUSION

For the foregoing reasons, the appeal filed by Edison presents no question warranting review of the decision below, and should be denied. Alternatively, the judgment below should be affirmed.

Dated, San Francisco, California
November 14, 1978.

Respectfully submitted,

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